August 25, 2005

William W. Erhart, Esquire
800 King Street, Suite 302
Wilmington, DE 19801

James A. Landon, Esquire
Woloshin, Tenenbaum, Lynch,
Natalie & Gagne, P.A.
3200 Concord Pike
P.O. Box 7329
Wilmington, DE 19803

Re: ***Karen Drabold v. Pamela C. Kenney***
C.A. No.: 2004-03-867

Date Submitted: August 23, 2005
Date Decided: August 25, 2005

LETTER OPINION

Dear Counsel.:

Trial in the above captioned matter took place on Tuesday, August 23, 2005. Following the receipt of evidence and testimony the Court reserved decision. This is the Court's final decision and order.

THE FACTS

The instant complaint is a civil action for a debt in the amount of $18,630.00 purportedly for money lent by plaintiff to defendant from April 3, 2003 through October 1, 2003. According to paragraph 4 of the complaint, defendant breached an agreement to make monthly $300.00 payments by direct deposit to plaintiff's checking account to discharge the alleged debt. Counsel

for the plaintiff seeks $18,630.00 plus interest at the statutory rate on the amount of the judgment as well as the attorney's fees and costs.

Defendant has answered the complaint and denied liability. Defendant has asserted a counterclaim for $7,175.00 for money allegedly paid by the defendant to plaintiff from on or about February 15, 2002 through on or about October 26, 2003. Defendant seeks attorney's fees as well.[1]

In the pretrial statement plaintiff asserted and also presented evidence at trial that she loaned from her personal bank account to the defendant over an extended period of time five personal checks totaling $10,050.00. Only one check for the amount of $300.00 was issued by the defendant for repayment of a personal loan. Plaintiff also asserted in the pretrial statement, as well as present evidence at trial, that she was listed as a creditor for $9,500.00 on bankruptcy documents signed by the defendant. Plaintiff also presented in the pretrial statement that the defendant received $7,500.00 from the plaintiff in WSFS check number 188. One day after the loan amount was received by the plaintiff from WSFS plaintiff paid said monies to the defendant.

At trial the parties presented the following exhibits which where either stipulated or moved into evidence.[2, 3]

---

[1] Neither counsel asserted at trial or in the pleadings cited a statute, case law or any written or oral contract provision which would allow this Court to award attorney's fees.

[2] Plaintiff's Exhibit No.: 1 was a composite exhibits of checks issued to the defendant by the plaintiff from August 20, 1991 through August 20, 2002. Plaintiff's Exhibit No.: 2 was check No.: 1886 issued by the plaintiff to the defendant in the amount of $1,200.00 on April 2, 2003; Plaintiff's Exhibit No.: 3 was loan agreement between plaintiff and WSFS, loan no: 0100028117/1 dated April 1, 2003. Plaintiff's Exhibit No.: 4 was check no.: 1888 issued by plaintiff to the defendant in the amount of $7,500.00 on April 3, 2003. Plaintiff's Exhibit No.: 5 was a WSFS bank statement for period between March 20, 2003 and April 20, 2003 reflecting a cash withdrawal of $300.00 on April 9, 2003. Plaintiff's Exhibit No. 6 was check no: 1891 issued by plaintiff to the defendant in the amount of $1,000.00 on April 14, 2003. Plaintiff's Exhibit No. 7 was WSFS bank statement for the period between April 20, 2003 and May 20, 2003 reflecting a cash withdrawal of $200.00 on May 6, 2003. Plaintiff's Exhibit No. 8 was a WSFS bank statement for the period between June 20, 2003 and July 20, 2003 reflecting a cash withdrawal of $500.00 on July 7, 2003 and a cash withdrawal of $500.00 on July 10, 2003. Plaintiff's Exhibit No. 9 was WSFS bank statement for a period between July 20, 2003 and August 20, 2003 reflecting a cash withdrawal of $500.00 on

At trial Karen Sue Drabold ("Drabold" and/or "plaintiff") was sworn and testified. She was born in New Jersey on February 1, 1957 and raised in Delaware. She has a high school diploma and is a Consumerable Planner at Dade Behring in Glasgow. She met the defendant at work and they have been friends since 1982. Defendant is in a management position at the same employer at the present time.

At trial, counsel for the plaintiff testified through the various exhibits that have been premarked and received into evidence. Plaintiff's No. 1 and 2 were presented to the Court as Plaintiff's A and B for identification purposes only. Following legal argument by counsel they were received into evidence by the Court.

Drabold testified in detail as to the summary and substance of all plaintiff's exhibits which were now received into evidence. The exhibits represent the money she lent to the defendant during the time period set forth in those exhibits.

July 25, 2003 and a cash withdrawal of $500.00 on July 30, 2003. Plaintiff's Exhibit No. 10 was a loan agreement between Plaintiff and WSFS bank, loan note no.: 0100039932/1 dated August 1, 2003, Plaintiff's Exhibit 11 was check no.: 1930, issued by plaintiff to defendant for the amount of $837.00 on August 2, 2003. Plaintiff's Exhibit 12 was WSFS bank statement for the period between July 20, 2003 and August 20, 2003 reflecting a cash withdrawal of $500.00 on August 4, 2003. Plaintiff's Exhibit No.: 13 was check no: 1931 issued by plaintiff to defendant for the amount of $200.00 on August 5, 2003. Plaintiff's Exhibit no.: 14 was a WSFS bank statement for the period of August 20, 2003 and September 20, 2003 reflecting a cash withdrawal of $500.00 on August 25, 2003 and a cash withdrawal of $300.00 on August 29, 2003. Page 3 indicates plaintiff's saving statement reflects a withdrawal by plaintiff for $2,000.00. Plaintiff's Exhibit No.: 15 was check no.: 1957 issued by plaintiff to defendant for the amount of $330.00 on October 1, 2003. Plaintiff's Exhibit No.: 16 was a summary of the entire transactions between the plaintiff and the defendant which included the date of the loan or cash payments, the loan amount, whether the money was check or cash, the pending total balance, the bank loan debt and certain monies in the final column indicating direct payments to the defendant from the plaintiff. This exhibit no. 16 was offered at trial as a summary of the total cash, check, loan relationship between the parties starting with March 31, 2003 and ending with August 25, 2003 and details with specificity what plaintiff believes is the money she gave to the defendant.

[3] Defendant's Exhibits were moved into evidence at trial. Defendant's Exhibit No.: 1 was a series of checks, nos. 686, 667, and 665 made out to Karen S. Drabold from Pamela C. Kenney for $300.00 respectively. Defendant's Exhibit No. 2 was moved into evidence by stipulation and was earning statements of the defendant which she was able to retrieve after she moved from her residence. The statements began April 27, 2003 and ended October 26, 2003. These statements of earnings are from Dade Behring, both parties' employer and indicate Defendant's deductions, withholdings, deposits and other matters filed and paid through her employer. Defendant's Exhibit No. 3 were statements from Artisan's Bank which are the Pamela C. Kenney's checking account which she offered into evidence without objection and detailed various payroll deductions, cash withdrawals, ATM withdrawals and cash disbursements which allegedly she paid in part back to the plaintiff.

Drabold indicated she filed a loan application and was granted a $12,000.00 loan from WSFS and then wrote the defendant a check offered as Plaintiff's Exhibit No. 4 for $7,500.00 on April 3, 2003. She testified the purpose of the loan was "Home Improvement" As of April 3, 2003, plaintiff alleged defendant owed her $12,000.00 as total monies representing the underlying debt. Within three (3) weeks of giving defendant a $7,500.00 check she wrote an additional check in the amount of $1,000.00 and also gave the defendant on April 9, 2003 a check for $300.00. On April 14, 2003 she gave defendant check no. 189 for $1,000.00. Exhibit No. 6 was received into evidence as noted below for $1,000.00.

Plaintiff moved into evidence Plaintiff's Exhibit No. 5 which showed a cash withdrawal of $3,000.00 Plaintiff's Exhibit No. 7 was received into evidence which indicated a $200.00 cash withdrawal. At the end of July 2003 Plaintiff's Exhibit 10 indicated that on July 7, July 10 and July 25, 2003 there were $500.00 cash withdrawals. Exhibit 8 reflected two (2) $500.00 cash withdrawals on June 27th and July 10th, 2003 all from plaintiff's bank statements.

Drabold indicated at trial at this juncture defendant requested more money and told her, "Don't ask me any questions, I am in depression and I want to go to Delaware Park to deal with my depression." Plaintiff's Exhibit 9 reflected separate $500.00 cash withdrawals on July 25 and July 30, 2003 for a total of $1,000.00. Defendant then requested an extra $2,500.00 to extend the subject loan. Plaintiff's Exhibit No. 10 indicated plaintiff then applied for a loan application and rolled over the first loan to the second loan for $13,100.00. Plaintiff's Exhibit No. 16 indicated three (3) payments made of $500.00 as direct deposits and the total payments were now $14,796.00 which was the total monies owed by defendant to the plaintiff. After the second loan application plaintiff gave defendant $837.00 and an additional $461.00 because defendant told her "That's my money from the loan."

At this time and place Drabold told the defendant "I'm not going to lend you any more money" and "This is getting out of control." Defendant told Drapbold that she was getting an award at work for $2,000.00 and therefore without any written agreement as requested by Drabold, plaintiff gave the defendant another $2,000.00 in cash.

Drabold testified about the agreement in that the defendant would make direct deposit payments of $500.00 each in order to repay these monies back. They stopped in December 2003. Drabold then told her "You are not returning my calls, I am going to get a lawyer and you're stealing from me." On January 20, 2004 the parties got together and decided they were not going to reconcile or be 'soul mates' any longer and the defendant told Drabold, "Joyce is handling my finances and I am only getting $20.00 a week." As of November 8, 2003 plaintiff asserted that defendant owed plaintiff $4,130.00 plus $12,696.00 for a total of $16,826.00. At the final meeting between the parties they agreed that plaintiff would not buy a house and they would no longer be 'soul mates.' The defendant also had a new girl friend. Defendant did not make any $500.00 payments to the defendant or make any direct deposits.

The defense presented their case in chief. Pamela C. Kenney ("Kenney") was sworn in and testified. Kenney was born in Wilmington, Delaware and has a high school diploma and "some college". She works at Dade Behring as a Production Supervisor and has been so employed for 29 years. She agrees with plaintiff that they met in 1982. Kenney was divorced in 1984 and had one daughter and from December 1984 through 1991 the parties in this civil action enjoyed a serious relationship. From 1991 through 1995 they were 'good friends'. They saw each other at work and enjoyed "hanging out". During the year 2003 plaintiff would pick up the defendant and go out to Delaware Park with defendant's daughter Mary Beth. Mary Beth had health problems with her heart ventricle and was undergoing serious medical procedures at St.

Christopher in Philadelphia. Mary Beth also had a "patch" installed in a hole in her ventricle in January 2003.

According to defendant the parties "hung out" and attended a benefit in April 2003 for her daughter Mary Beth at Judy Justice's house.

The defendant believed the plaintiff was "very generous" and a good partner that was good to her children but believed she has instituted this action for money she believes was a gift because defendant has a new girlfriend.

According to the defendant, the plaintiff has also started dating Georgeanne. Because of this relationship plaintiff has instituted this lawsuit in the Court of Common Pleas to receive monies which she believes as noted above were clearly contemplated as gifts during their relationship.

According to the defendant, $7,500.00 was paid in full which is the only money owed to the plaintiff.

Defendant testified through Defendant's Exhibits 1, 2 and 3. She detailed the money she believes, along with cash payments that appear in those exhibits, clearly indicate all the subject loans have been paid in full as she promised to plaintiff. In essence, defendant testified the $7,500.00 she agreed to pay in six months has been discharged. She believes she no longer owes any other monies to the plaintiff. Defendant believes the lawsuit was solely to "get even" with her because of her new relationships. She believes that any monies given to her which appear in the plaintiff's exhibits were solely gifts not anticipated to repayment and because the parties enjoyed a relationship.[4]

[4] There was argument by plaintiff that defendant stopped the $300.00 cash payments by direct deposit because of a one (1) time garnishment of her wages. The Court finds that argument not persuasive.

THE LAW

This is a civil debt action. The plaintiff has a burden of proving the underlying debt action by a preponderance of the evidence. *Wirt v. Matthews*, CCP. N.C. C.A. No.: 199-12 271, 2002 CP LEXIS 17, January 17, 2000 (Welch, J.), *Orsini Topsoil and Frank Orsini v. Kenneth T. Carter, et al.*, C.A. No.: 2002-03-430, CCP, NC, 2004 LEXIS 10, April 7 2004 (Welch, J.).

The Court notes as a trier of fact it is the sole judge of the credibility of each fact witness. If the Court finds the evidence to be presented in conflict, as in the instant record, it is the Court's duty to reconcile these conflicts, if reasonably possible to make one harmonious story. If the Court cannot do this, the Court must give credit to the portion of the testimony which, in the Court's judgment, is most worthy of credit and disregard any portion of the testimony in which in the Court's judgment is unworthy of credit. In performing this task, the Court takes into consideration the demeanor of each fact witness, the apparent fairness in giving their testimony, the opportunities in hearing and knowing the facts about which each fact witness testified, and any bias or interest each fact witness may have concerning the case.

OPINION AND ORDER

There is no doubt that the trial record indicates the parties enjoyed a social relationship during the time period set forth in both testimony and trial exhibits. Defendant clearly owed the plaintiff $7,500.00, but the testimony indicates that the she has paid that money back within the six months. What is left for this Court to decide is whether the monies which are detailed in plaintiff's Exhibit No. 16 over and above the monies are actually a debt which has been established by the plaintiff in the trial record by a preponderance of the evidence. The Court must note that although there is a detailed transactional analysis of the cash payments made by the plaintiff to defendant in Plaintiff's Exhibit No. 16. However, no agreement whatsoever has

been produced in the trial record which would cause this Court to believe the parties were contemplating an actual debt to be paid by the defendant to the plaintiff for the balance over and above $7,500.00.

In short, when question several times on the witness stand, plaintiff did not testify as to any exact time period for repayment for this balance over $7,500.00; the interest rate for the balance; nor did she indicate the parties, even after she requested defendant to do so, entered into a binding written agreement or note payable from the defendant to the plaintiff. In short, the Court concludes the parties enjoyed a romantic relationship. The plaintiff was quite generous in helping the defendant with the medical expenses of her child, Mary Beth, as well as visiting quite frequently Delaware Park in order to assist the defendant with her "depression."

However, the Court cannot find by a preponderance of the evidence that these monies were to be paid and constituted an actual underlying debt by the defendant to the plaintiff. In short, after considering the credibility of the witness as well as all the exhibits and oral testimony received into the evidence, the record is equally balanced as to whether the monies given by plaintiff to defendant were an actual debt. The Court notes again that no written documents; promissory note; writings or other contemporaneous memoranda appear in the record detailing the exact terms of a debt, interest rate or loan repayment date for these monies over and above $7,500.00. The detailed transactions of the cash disbursements obviously indicate plaintiff forwarded monies to the defendant. However the Court cannot conclude by a preponderance of evidence they were an actual debt by defendant.

The Court enters judgment in favor of the defendant on the claim of $18,630.00 As to the monies over $7,500.00, no note was executed by the parties and no contemporaneous memoranda, promissory note or writing exists in the trial record documenting these monies were

anything but gifts with no repayment terms, accrual date, or interest rate. No award of attorney's fees is authorized by the Court by civil statute, case law, or contract provision.

With regard to defendant's counterclaim, judgment in the amount of $7,175.00 is hereby denied as to the preponderance of evidence standard was not met by the defendant.

Each party shall bear their own costs.

IT IS SO ORDERED this 25th day of August, 2005.

John K. Welch
Associate Judge

Cc; Rebecca Dutton
CCP, Civil Clerk